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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRIAN D. WITZER, Plaintiff and Appellant, v. JOHN CURLANDER et al., Defendants and Respondents.	B202036 (Los Angeles County Super. Ct. No. LC072471)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Wolfe, Judge. Affirmed.

Law Offices of Brian D. Witzer and Andrew J. Spielberger for Plaintiff and Appellant.

Law Offices of John J. Jamgotchian and John J. Jamgotchian for Defendant and Respondent John Curlander.

Brian D. Witzer appeals from the judgment entered after the trial court granted summary judgment in favor of John Curlander in this action arising out of an option to purchase a home Witzer was leasing from Curlander. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The Lease and Option To Purchase*

In April or May 2003 Carol Lane was living with Witzer and the couple's daughter. Due to difficulties in the relationship, Lane decided to live elsewhere. Curlander, a long-time friend of Lane's, agreed to purchase a home for Lane to live in because she did not have sufficient financial resources to do so herself; Witzer agreed to pay the rent for Lane and their daughter.

A suitable home was located in Calabasas. The purchase price was $687,000; closing costs and expenses were more than $13,000. Curlander made a down payment of $126,400 and obtained a loan, secured by a deed of trust, for $549,600. Witzer also made a payment of $21,000 into escrow. At Curlander's insistence, Witzer and Lane both executed a five-year residential lease dated May 16, 2003, which identified the lessee as "Carol Lane/Brian D. Witzer." The lease included an option to purchase the home for $700,000; the option expired on "June 31 [*sic*], 2004."[1]

Soon after the transaction was completed, Witzer demanded reimbursement for the $21,000 he had paid in connection with the purchase. Curlander refused, contending the $21,000 was payment for his agreement to favorable lease terms and the purchase option. Eventually, Witzer and Curlander agreed the $21,000 would be consideration for extension of the purchase option until June 30, 2005. In a letter from Witzer to Curlander dated October 14, 2003, Witzer stated, "It was nice speaking with you today wherein you and I agreed to modify our present agreement to include a one year extension on the present option to purchase the home at 3635 El Encanto Drive. Accordingly, I will be given up to and including June 30, 2005, to exercise said option to purchase. The

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[1] The lease stated, "The option price is $700,000. The terms of purchase will be: cash or loan to purchase price."

purchase price will remain the same at $700,000 and it was agreed that you would maintain the $21,000 deposit that I paid as a non refundable payment on the option to purchase the home as specified in our original agreement and as modified by this document."[2]

2. *Witzer's Attempts To Exercise the Purchase Option*

On June 13, 2005 an attorney for Witzer with the firm of Feinberg and Waller sent Curlander a letter stating, "Mr. Witzer is choosing to exercise his purchase option" and asserting, although the purchase price was $700,000, "You currently have in your possession a $21,000 earnest money deposit, which will be applied towards the purchase price." The letter also stated, "The only contingency remaining for this purchase is that Mr. Witzer will require clear title to the property at time of closing." In addition to the letter, Witzer sent Curlander a residential purchase agreement indicating the balance of the purchase price due was $679,000. The purchase agreement, which was styled as an offer from Witzer, had an "expiration of offer" date of June 27, 2005. The agreement also provided Witzer had three days after acceptance to, among other things, complete all buyer investigations and approve all disclosures and reports.[3]

After receiving no response from Curlander, a different attorney with Feinberg and Waller sent Curlander a letter dated June 27, 2005 stating, "Pursuant to our client's authorization, any contingencies regarding the acceptance of Mr. Witzer's purchase offer (specifically with regard to the date of acceptance) are hereby waived. This offer shall remain open until such time as Mr. Witzer revokes it by written instrument. [¶] This office has made several attempts to contact you, but as of yet, we have received no reply. We look forward to hearing from you and completing the sale of this property pursuant to

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[2] Curlander signed the letter under the phrase, "Above is Accepted and Agreed, John Curlander."

[3] The agreement defined "acceptance" as "the time the offer or final counter offer is accepted in writing by a party and is delivered to and personally received by the other party or that party's authorized agent in accordance with the terms of this offer or a final counter offer."

your agreement with our client." Another copy of the purchase agreement was sent with the letter.

On June 28, 2005 a third attorney with Feinberg and Waller sent Curlander another letter, which stated, "As a correction to the letter dated June 27, 2005, by Mr. Eric Bernhardt from this office, please accept this letter as official notice that Mr. Witzer is choosing to exercise his purchase option on the above-referenced property. As had been presented to you in previous correspondence from me, the only contingency remaining in full force and effect for this transaction is Mr. Witzer's receipt of clear title to the property at the close of escrow. [¶] Further, the termination date of June 27, 2005, written in the contract previously sent you was an inadvertent error and is hereby withdrawn. The offer to purchase shall remain open pending written revocation by Mr. Witzer." Curlander did not respond to any of the letters sent by Witzer's counsel.

3. *The Complaint*

Witzer filed a complaint against Curlander on September 2, 2005 for specific performance of purchase option, breach of contract and imposition of constructive trust. After discussion with Curlander's counsel, on February 9, 2006 Witzer filed a first amended complaint, again naming only Curlander, for specific performance of purchase option, specific performance of real estate purchase agreement, breach of contract of option to purchase, breach of contract of real estate purchase agreement and imposition of constructive trust.

Curlander demurred to all causes of action based on the purchase option in the lease, arguing Lane, who was identified as a lessee in the lease, was an indispensible party. The trial court sustained Curlander's demurrer with leave to amend. Witzer filed a second amended complaint naming Lane and adding a cause of action for declaratory relief.

4. *Curlander's Motion for Summary Judgment and the Trial Court's Order Granting the Motion and Denying Witzer's Motion for Reconsideration*

Following discovery Curlander filed a motion for summary judgment or, in the alternative, summary adjudication, primarily arguing Witzer had not properly exercised

the option when he attempted to purchase the Calabasas property and, in any event, only Witzer and Lane, acting jointly, were entitled to exercise the option. The trial court agreed with Curlander's interpretation of the relevant documents and granted the motion.

First, the trial court found, as stated in its tentative decision, which was then adopted as the court's final decision, Witzer's attempt to exercise the option was invalid because it was not on the same terms as provided in the option agreement: "[N]o parol evidence is needed to understand this provision of the [October 14, 2003] agreement; to wit, the $21,000 deposit was being used to extend the option to purchase and not as a credit towards the purchase of the property. Indeed, this is consistent with the original Residential Lease with Option to Purchase Agreement wherein it indicated that Plaintiff did not pay any money towards the purchase price of the property. [Citation.] [¶] Thus when Plaintiff attempted to exercise the option for only $679,000, said was an amount below the amount set forth pursuant to the contract between the parties."

Second, the court found the option had to be jointly exercised by Witzer and Lane because, pursuant to Civil Code section 1431, "a right created in favor of several persons[] is presumed to be joint and not several . . . ." The trial court denied Witzer's motion for reconsideration.[4]

CONTENTIONS

Witzer contends the trial court erred in failing to render a statement of decision and the record of the hearing itself is too unclear to serve as the basis for the court's ruling; there are triable issues of material fact, including whether the parties intended the option only to be exercisable jointly by Witzer and Lane and whether Witzer's attempt to exercise the option was defective; and Curlander should be estopped from claiming Witzer's attempt to exercise the option was defective.

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[4] Lane did not separately file a motion for summary judgment or join in Curlander's motion. She is not a party to the appeal.

DISCUSSION

1. *Standard of Review*

We review the trial court's grant of summary judgment de novo and decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; Code Civ. Proc., § 437c, subd. (c).)[5] When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "show[] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

"[T]he defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.'" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (§ 437, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.)

On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

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[5] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

2. *The Trial Court's Summary Judgment Order Is Adequate for Review*

Section 437c, subdivision (g), requires the trial court to articulate the reasons for its decision to grant summary judgment in an order that "specifically refer[s] to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists."[6] Witzer contends the trial court failed to comply with section 437c, subdivision (g), because it never issued a "statement of decision," but instead stated its findings in a tentative decision that was adopted as a final ruling, as well as in the comments on the record at the hearing on the motion, which are reflected in the reporter's transcript. Witzer also argues it is unclear from the record what evidence was considered or may have been excluded by the court and what evidence the court found persuasive.

A trial court's failure to comply with section 437c, subdivision (g), does not automatically require a reversal. (*Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1627.) The de novo standard for appellate review of an order granting summary judgment frequently means the lack of a proper order constitutes harmless

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[6] The full text of section 437c, subdivision (g), provides: "Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order." The requirement that an order denying summary judgment include a specific reference to the evidence establishing the existence of a triable issue of material fact was added to section 437c in 1983. (Stats. 1983, ch. 490, § 1, p.1990; see *Continental Ins. Co. v. Superior Court* (1985) 165 Cal.App.3d 1069, 1071 [1983 amendment "requires a precise explanation of a trial court ruling denying summary judgment"].) The complementary provision at issue in this case, requiring specification of the evidence indicating that no triable issue exists, was added by amendment to section 437c in 1990. (Stats.1990, ch. 1561, § 2, p. 7332.)

error. (*Soto v. State of California* (1997) 56 Cal.App.4th 196, 199 ["[t]he lack of a statement of reasons presents no harm where . . . independent review establishes the validity of the judgment"].)

In *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 449, the Court of Appeal explained when noncompliance with section 437c, subdivision (g), cannot be considered harmless error, holding that, if the issues are complex and the evidence conflicting and the trial court has "clearly decided credibility issues, at least through its apparent decision to disregard certain contradictions in the evidence," de novo review is inappropriate because "[w]ithout a sufficient statement of reasons from the court, we are precluded from undertaking a meaningful review of the issues." (See *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146 [giving as example of when noncompliance with § 437c, subd. (g), is not harmless "when the trial court has discretion to ignore a party's declaration that conflicts with the party's deposition testimony"]; see also *W.F. Hayward Co. v. Transamerica Ins. Co.* (1993) 16 Cal.App.4th 1101, 1111 ["meaningful appellate review" is "a key objective" of § 437c, subd. (g)].)

To the extent there is any technical deficiency in the trial court's written order granting summary judgment because it fails to refer to all of the evidence Witzer proffered in an attempt to demonstrate a triable issue of fact, the court's detailed remarks in this case provide a fully sufficient basis for "meaningful appellate review." (See *Santa Barbara Pistachio Ranch v. Chowchilla Water Dist., supra,* 88 Cal.App.4th at p. 448.) In addition to the final order, which by incorporating the court's tentative decision sets forth the reasoning and factual basis for the ruling, the transcript of the hearing demonstrates the court had a firm understanding of the evidence submitted by the parties and the legal theories advanced by them in support of their respective positions. Moreover, the trial court ruled on Curlander's objections to the evidence offered by Witzer in opposition to the motion, and there were no evidentiary objections made by Witzer. Any error, therefore, was harmless.

3. *The Trial Court Properly Granted Summary Judgment in Favor of Curlander Because Witzer Did Not Exercise the Purchase Option on the Terms Provided in the Option*

An option to purchase property is a unilateral agreement, supported by sufficient consideration, to sell property upon specified terms and conditions for a fixed period of time: "An option may be viewed as a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract and at the price set forth therein. It is, in other words, a unilateral contract under which the optionee, for consideration he has given, receives from the optionor the right and the power to create a contract of purchase during the life of the option. 'An irrevocable option is a *contract,* made for consideration, to keep an offer open for a prescribed period.' [Citation.] An option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract." (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927-928; see *Palo Alto Town & County Village, Inc. v. Bbtc Co.* (1974) 11 Cal.3d 494, 502 ["option, as a matter of legal theory, is considered to have a dual nature: on the one hand it is an irrevocable offer, which upon acceptance ripens into a bilateral contract, and on the other hand, it is a unilateral contract which binds the optionor to perform an underlying agreement upon the optionee's performance of a condition precedent"].)

Although under ordinary contract principles a counteroffer extinguishes an offer (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856 ["'terms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract [citations]; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer'"]), such is not the case when an optionee attempts to exercise an option on different terms and conditions from those provided in the option, that is, if the optionee essentially makes a counteroffer. "[U]nlike a conditional or qualified acceptance in the formation stage of a contract, a purported exercise of an option which is qualified or made conditional, does not in and of

itself terminate the option if there yet remains time during the term of the option in which the unauthorized qualification or condition may be removed and the option exercised absolutely." (*C. Robert Nattress & Assocs. v. Cidco* (1986) 184 Cal.App.3d 55, 67; but see *Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 757 ["when an offer under an option contract has been rejected, the party rejecting cannot subsequently, at his option, accept the rejected offer and thus convert the same to an agreement by acceptance"]; see generally 1 Miller & Starr, Cal. Real Estate (3d ed.) § 1.50, fn. 3 ["*Landberg* case appears incorrect in principle and probably should not be relied on by subsequent decisions as a correct statement of California law"].)

Whatever the meaning and effect of the June 13, 2005 and June 27, 2005 letters from his counsel, Witzer properly asserts the purchase option, as set forth in the original lease agreement and modified on October 14, 2003, remained available for an unconditional acceptance until June 30, 2005. Witzer argues he, in fact, properly exercised the option in the June 28, 2005 letter from his counsel, which stated, "As a correction to the letter dated June 27, 2005 . . . please accept this letter as official notice that Mr. Witzer is choosing to exercise his purchase option on the above-referenced property." Because this letter once again sought to change the express terms of the option agreement, however, it did not constitute a valid exercise of the option. (See *Erich v. Granoff*, *supra*, 109 Cal.App.3d at pp. 927-928.)

As a threshold matter, the fact Witzer and Curlander disagree as to the meaning of the option agreement itself, the June 28, 2005 letter from Witzer's counsel or both documents does not, in itself, preclude summary judgment. The interpretation of a contract or other legal document is a judicial function. (See *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 39-40.) In engaging in this function, the trial court "give[s] effect to the mutual intention of the parties as it existed" at the time the contract was executed. (Civ. Code, § 1636.) Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. (Civ. Code, §§ 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"], 1638 [the

"language of a contract is to govern its interpretation"].) Even if there is relevant, admissible extrinsic evidence bearing on the proper interpretation of the document, when there is no material conflict in that evidence, the trial court interprets the contract as a matter of law. (*City of Hope Nat. Medical Center v. Genentech, Inc*. (2008) 43 Cal.4th 375, 395 [interpretation of written instrument solely a judicial function "when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence"]; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.) This is true even when the undisputed extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. (*Parsons*, at p. 865; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.)

There is no question the option price for the Calabasas home was $700,000. In addition, any dispute regarding how the $21,000 should be treated was eliminated by the October 14, 2003 agreement extending the option for one year in which Witzer stated, and Curlander agreed, "The purchase price will remain the same at $700,000 and it was agreed that you would maintain the $21,000 deposit that I paid as a non refundable payment on the option to purchase the home as specified in our original agreement and as modified by this document."[7]

Witzer insists his counsel's June 28, 2005 letter unconditionally accepted the option and nothing more was required. Read in context, however, it is clear the June 28, 2005 letter was yet another invalid exercise because Witzer was still attempting to apply the $21,000 payment toward the purchase price. Although the June 28, 2005 letter stated it was "a correction to the letter dated June 27, 2005," the only "inadvertent error" referred to in the June 28 letter was "the termination date of June 27, 2005, written in the [purchase agreement] previously sent [to Curlander by Witzer]." That termination date was "withdrawn," and the new letter stated the "offer to purchase shall remain open

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[7] The original lease agreement expressly provided no "option consideration" was to be applied toward the purchase price.

pending written revocation by Mr. Witzer." The "offer to purchase" referred to, however, was the $679,000 offer contained in the previous letters and purchase agreement sent to Curlander. There is simply nothing in the letter that suggests Witzer intended to relinquish his position the $21,000 payment should be applied to the purchase price. Indeed, that Witzer's counsel stated Witzer's offer would remain open until he revoked it is markedly inconsistent with the position Witzer was simply accepting Curlander's irrevocable offer -- that is, exercising the option -- on its stated terms. Witzer never offered any extrinsic evidence suggesting otherwise in opposition to Curlander's motion for summary judgment.

Even if his notice to exercise the purchase option was defective, Witzer argues Curlander should be estopped from asserting that defect under the estoppel principles articulated in *Layton v. West* (1969) 271 Cal.App.2d 508 because Curlander failed to notify Witzer of the purported defect. In *Layton* the court stated, "Any tender of performance, including the exercise of an option, is ineffective if it imposes conditions upon its acceptance which the offeror is not entitled to demand. [Citations.] However, the imposition of such conditions is waived by the offeree if he does not specifically point out the alleged defects in the tender. (Civ. Code, § 1501; Code Civ. Proc., § 2076; *Hohener v. Gauss* (1963) 221 Cal.App.2d 797.) The rationale of the requirement of specific objection is that the offeror should be permitted to remedy any defects in his tender; the offeree is therefore not allowed to remain silent at the time of the tender and later surprise the offeror with hidden objections." (*Layton*, at pp. 511-512.)

The estoppel principle articulated in *Layton* is predicated upon section 2076[8] and Civil Code section 1501,[9] which address an "objection to a tender at the time of the tender itself." (*Noyes v. Habitation Resources, Inc.* (1975) 49 Cal.App.3d 910, 913.) "Most of the decisions applying section[] 2076 and [Civil Code section] 1501 rely on the doctrine of estoppel. [Citation.] These cases generally arise either where a creditor has refused a tender without specifying his reasons for the refusal or where he has accepted a tender without informing the debtor that the tender is nonconforming." (*Sanguansak v. Myers* (1986) 178 Cal.App.3d 110, 115.) "The purpose of these two code sections is to allow a debtor who is willing and able to pay his debt to know what his creditor demands so that the debtor may, if he wishes, make a conforming tender." (*Noyes*, at p. 914; see *Sanguansak*, at pp. 115, 116-117 [§ 2076 and Civ. Code, § 1501, which should be read together, "are primarily intended to protect debtors/offerors who perform or tender performance in good faith from harm by creditors/offerees who refuse to accept or intentionally fail to demand proper tender"].)

In the trial court's tentative ruling denying Witzer's motion for reconsideration, later incorporated into a final order, the court found the cases involving section 2076 and Civil Code section 1501 were inapplicable because Curlander did not object to the mode of tender, but rather to the amount. While we do not agree those provisions are necessarily inapplicable to an objection to the amount of the tender (see § 2076), the trial court's rejection of Witzer's estoppel argument was nevertheless sound.

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[8] Section 2076 states, "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

[9] Civil Code section 1501 states, "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated."

A party who knows or should have known of the defect in his or her tender may not later complain the receiving party waived an objection by failing to identify it at the time of tender. (See *Sanguansak v. Myers, supra*, 178 Cal.App.3d 110, 117 [debtor could not retain benefit of payoff error because he "knew or should have known of the deficiency of the tender because the prepayment charge was clearly stated in the promissory note"]; *McElroy v. Chase Manhattan Mortgage Corp.* (2005) 134 Cal.App.4th 388, 394 [§ 2076 and Civ. Code, § 1501 "'do not apply where . . . the amount of the creditor's demand is known to the debtor and the amount of the tender is wholly insufficient'"].) It was Witzer's burden, as the "party asserting a waiver[,] to introduce evidence of the facts constituting it . . . ." (*Mott v. Cline* (1927) 200 Cal.434, 451 [party asserting waiver under § 2076 and Civ. Code, § 1501 failed to meet burden of proof].) Witzer failed to introduce any evidence opposing Curlander's motion for summary judgment that would allow a reasonable trier of fact to find Witzer did not know the June 28, 2005 tender was defective because it sought to apply the $21,000 payment toward the purchase price of the Calabasas property. Accordingly, the trial court did not err in concluding Witzer had failed to properly exercise the option and in granting summary judgment on that ground.[10]

DISPOSITION

The judgment is affirmed. Curlander is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.

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[10] Because we affirm summary judgment on this ground, we need not consider whether the option could only be exercised jointly by Witzer and Lane.